Paradoxically, the Uniform Business Corporation Act contains no provision in regard to this problem.

By the doctrine prevailing in Massachusetts and Wisconsin, in the absence of express statutory restrictions, corporations may purchase their own shares in good faith out of capital, provided this is done without prejudice to rights of existing creditors or discrimination against other shareholders.[21] Seemingly, the decision of the *Wildermuth* case is in accord with this general policy, and completes the anomolous metamorphosis through which the Ohio law has passed. Time forbids a discussion of the merits of this policy. Suffice it is to say that it has been "viewed with alarm" by a goodly number of critics, the principal objection being that it constitutes a withdrawal of assets in favor of the selling shareholder to the possible serious prejudice of creditors and remaining shareholders.[22]

R. D. K.

DOMESTIC RELATIONS

MAINTENANCE OF A BASTARD CHILD — INTERPRETATION OF OHIO GENERAL CODE, SECTION 12123

The Probate Court adjudged the defendant the putative father of a bastard child and ordered him to pay a reasonable sum for its support an maintenance, such weekly payments to begin at the date of adjudication. From this judgment the mother appealed to the Court of Appeals, contending that the weekly payments should begin at the date of birth of the child, some nineteen months prior to the date of adjudication. *Held:* Affirmed. The judgment given was the only one permissible under a strict interpretation of section 12123, Ohio G. C. One judge dissented.[1] *State* ex rel *Griffin* v. *Zimmerman*, 67 Ohio App. 272, 21 Ohio O. 253 (1941).

A review of the development of the Bastardy Act is necessary

[21] Barrett v. W. A. Webster Lumber Co., 275 Mass. 302, 175 N. E. 765 (1931); Scriggins v. Thomas Dolby Co., 290 Mass. 414, 195 N. E. 749 (1935); Spiegel v. Beacon Participations Inc. et al, 297 Mass. 398, 8 N. E. (2d) 895 (1937); Koepler v. Crocker Chair Co., 200 Wis. 476, 228 N. W. 130 (1930); Rasmussen v. Schweizer, 194 Wis. 362, 216 N. W. 481 (1927); also *see* Grace Securities Corp. v. Roberts, 158 Va. 792, 164 S. E. 700 (1932). C. F. Boggs v. Fleming, 66 Fed. (2d) 859 (C. C. A. 1933).

[22] *See* Nussbaum, *Acquisition by a Corporation of Its Own Stock*, (1935) 35 COL. L. REV. 971; Levy, *Purchase by an English Company of Its Shares*, (1930) 79 U. PA. L. REV. 45; WARREN, *Progress of the Law: Corporations*, (1921) 34 HARV. L. REV. 282, 293; Levy, *op. cit. supra*, note 20.

[1] Crow, J., dissented.

to interpret Ohio G. C. Sec. 12123, as it now stands. At common law the reputed father was under no legal duty to maintain his illegitimate child.[2] Ohio's first Bastardy Act rejected the common law and provided that the putative father "shall stand charged with the maintenance" of the bastard child "in such sum or sums as the court shall order and direct." [3] The purpose of this early legislation was to compel the putative father to perform his moral obligation, namely, support his child, and thereby to protect the state from the expense of maintaining it.[4]

In 1923 the Legislature amended Ohio G. C. Sec. 12123, eliminating the provision for maintenance of the bastard child, and inserting, in lieu thereof, a provision that the defendant pay the complainant such sum as the court may find to be necessary "for her support, maintenance and necessary expenses, caused by pregnancy and childbirth together with costs of prosecution." [5] It will be observed that it was only for the complainant's support that the defendant was charged, and not with the support of the bastard child.[6] This amendment, however, in no way extinguished the liability of the reputed father to support his illegitimate child, for it contained a proviso to the effect that it should not be construed as a bar to the prosecution of the accused for failure to support his illegitimate child under provisions of other statutes.[7] In conjunction with this proviso, the Juvenile Court Code, Ohio G. C. Sec. 1639-46, which previously provided only for the support of legitimate children, was amended to provide also for illegitimate children.[8]

[2] *See* State *ex rel.* Beebe v. Cowley, 116 Ohio St. 377, 156 N. E. 214 (1927); Hoffer v. White, 53 Ohio App. 187, 4 N. E. (2d) 595 (1936); Commonwealth v. Domes, 239 Mass. 592, 132 N. E. 363 (1921); Moncreif v. Ely, 19 Wend. (N. Y.) 405 (1857); 5 Ohio Jur., "Bastardy," Sec. 4; 4 Vernier, American Family Laws (1936) 206.

[3] 1824, Rev. Stat., Swan and Critchfield, Vol. I (1860) p. 178.

[4] *See* State *ex rel.* Beebe v. Cowley, 116 Ohio St., 377, 156 N. E. 214 (1927); Dimmit v. State, 112 Ohio St. 691, 148 N. E. 90 (1925); McKelvy v. State, 87 Ohio St. 1, 99 N. E. 1076 (1912); Musser v. Stewart, 21 Ohio St. 353 (1891); Hawes v. Cooksey, 13 Ohio 242 (1844); Walker v. Chandler, 15 Ohio App. 292 (1921).

[5] Ohio G. C., sec. 12123, as amended in 110 Ohio L. 296 (1923).

[6] *See* State *ex rel.* Beebe v. Cowley, 116 Ohio St. 377, 156 N. E. 214 (1927); Pummel v. State *ex rel.* Hill, 22 Ohio App. 340 (1926).

[7] The proviso clause states, "Provided, however, that nothing in this section shall be construed as a bar to the prosecution of the accused for failure to support his illegitimate child or children under the provisions of any statute providing for prosecution and punishment for non-support of legitimate or illegitimate children."

[8] Ohio G. C., sec. 1639-46 provides, "whoever being the father of an illegitimate child under the age of sixteen years and able to support or contribute to the support of such child, fails, neglects or refuses so to do . . . shall be fined . . . etc.; provided, if he shall pay each week for such purpose to the court, or to a trustee . . ., sentence may be suspended." *See* Creisar v. State, 97 Ohio St. 16 (1917) for holding that the above section prior to 1923 provided only for legitimate children.

Likewise, the Criminal Code charged the putative father with maintenance of the illegitimate child.[9]

The principal case interprets the 1938 amendment of Ohio G. C. Sec. 12123, which, after a lapse of fifteen years, reincorporated within the Bastardy Act the provision for maintenance of the bastard child by the putative father.[10] It provides that "if the child is alive" the father shall pay for the expenses of pregnancy and childbirth, and, in addition, "a reasonable weekly sum to be paid complainant for support and maintenance of said child up to eighteen years of age." It further provides that "in event said child is not born alive, or is not living" at the time of adjudication, defendant shall pay expenses of pregnancy and childbirth, and, in addition, "a reasonable amount for maintenance of said child until its death, and its funeral expenses." [11] It will be noted that the 1938 amendment *superimposed* on the existing statute, providing for the mother her expenses of pregnancy and childbirth, these provisions for maintenance of the bastard child.

Courts of other states have held that the provision for maintenance, in bastardy acts, may secure to the complainant reimbursement for the past as well as payment for the future support of the bastard child.[12] Likewise, in Ohio, prior to the 1923 amendment of Ohio G. C. Sec. 12123, there is indication that the maintenance from date of birth could be recovered.[13] In *Hinton* v. *Dickinson*,[14] where

[9] OHIO G. C., sec. 13008, *et seq.*; also see 1927 Ohio A. G. Opns., p. 912; but *cf.*, 1917 Ohio A. G. Opns., Vol. II p. 1687.

[10] 117 Ohio L. 808 (S. B. 396) (1938).

[11] OHIO G. C. sec. 12123 now reads, "If, in person or by counsel, the accused confesses in the court that the accusation is true or, if the jury find him guilty, he shall be adjudged the reputed father of the illegitimate child if said child is alive, and the court shall thereupon adjudge that he pay to the complainant such sum as the court may find to be necessary for her support, maintenance, and necessary expenses caused by pregnancy and childbirth together with costs of prosecution, and a reasonable weekly sum to be paid complainant for support and maintenance of said child up to eighteen years of age. In event said child is not born alive, or is not living at the time of plea or finding of guilty, the court shall order the accused to pay to the complainant such sum as the court may find to be necessary for her support, maintenance and necessary expenses caused by pregnancy, including therein a reasonable amount for maintenance of said child until its death, and funeral expenses . . . ."

[12] Spieger v. State, 32 Wis. 400 (1873); Hoffman v. State, 17 Wis. 596 (1863); *see* Woodbury v. Wilson, 133 Me. 329, 177 A. 708 (1935); Smith v. Lint, 37 Me. 546 (1854); State v. Beatty, 66 N. C. 648 (1872); Kyne v. Kyne, 100 P. (2d) 806 (1940); Tennant v. Brookover 12 W. Va. 337 (1878); 56 Am. Dec. 221 (1884); 3 R. C. L. 767.

[13] In Ely v. Ott, 14 Ohio C. C. 619, 7 Ohio C. D. 677 (1897), it was held a judgment of $1,300, was not unreasonable. The amount was to be paid in installments. At the time of adjudication the child was four years old, and evidence was presented to the court regarding the support and maintenance of the child up to the time of the action, such evidence being considered by the court in determining the sum stated above.

[14] Hinton v. Dickinson, 19 Ohio St. 583 (1869).

the illegitimate child died after the bastardy proceeding was begun, a judgment for $150 was affirmed. The reason advanced for the holding, in this early case, that the death of the child did not abate prosecution under the Bastardy Act, was that the mother was entitled to reimbursement for such items as costs of prosecution, birth expenses, burial expenses, and *caring for the child from the time of birth until death.*

The *Hinton* case was decided when the Bastardy Act was held to be for the benefit of the state rather than for the benefit of the mother. Being a liberal decision to the liking of the Legislature, it was codified and became part of the Bastardy Act.[15] This provision was repealed in 1923, however. Its elimination from the Bastardy Act would not necessarily have been significant since recovery under the Act was changed to provide only for the mother's expenses, exclusive of maintenance for the child.[16] With respect to such recovery a provision that the action should not abate on the death of the child is, of course, unnecessary.[17] But the failure to provide for non-abatement in the event of the child's death in the Juvenile Court Code, to which the provision for maintenance of the illegitimate child, was, in effect, transferred, is significant. Such a provision may be superfluous, other things being equal, as indicated by the court in the *Hinton* case. But, where the provision has once been in the statute and is subsequently eliminated, there is at least a possible inference that the recovery of maintenance expense, as opposed to the expenses of the mother, was not to be permitted when the child had died. In view of the close relation of the problems, this inference may also extend to the right to recover for maintenance of a living child prior to the adjudication. There is, therefore, reason for saying that, after 1923 and prior to 1938, recovery in case of a living child should be limited to maintenance after adjudication, and it was so held.[18] If this is true, then the court, in the instant case, had good grounds for emphasizing the

[15] In 75 Ohio Laws 742, sec. 16 (1878) it states, "The death of a bastard child shall not be cause of abatement, or bar to a prosecution for bastardy, if the mother is living; but the court trying the case shall, on conviction, take the death into consideration and give judgment for such sum as it deems just, the payment of which, or security therefore, may be enforced as above provided."

[16] In State *ex rel.* Beebe v. Cowley, 116 Ohio St. 377, 156 N. E. 214 (1927) it was held that the complainant could not recover for maintenance from date of birth to date of adjudication under the Bastardy Act.

[17] State *ex rel.* Discus v. Van Dorn, 56 Ohio App. 82, 8 Ohio O. 393, 10 N. E. (2d) 14 (1937); Seldenright v. Jenkins, 7 Ohio O. 127 (1936).

[18] See note 16, *supra.*

distinction in the present statute between the living child and the dead child, and pointing out that the Legislature adopted apt words to prescribe for maintenance from birth, only in the case where the child dies before adjudication.

The court did not, however, refer to this legislative history, and looking at the provisions as they now read, it may as reasonably be inferred that the Legislature did not insert the provisions into the statute in the case of the living child, that recovery be from birth, because it thought it was superfluous, and inserted it in the case of the dead child out of an abundance of caution.

The court's principal argument, however, is that the Bastardy Act modified the common law which imposes no liability on the reputed father, therefore it must be strictly interpreted.[19] Accordingly, until the defendant is adjudged the putative father, he has no liability. With respect to this factor the court could have just as easily held the other way. The common law was early rejected in Ohio in this situation. Ever since 1824 the putative father has been charged with the liability of supporting his illegitimate child.[20] The Act for the Maintenance of Minors, Ohio G. C. Secs. 13008-13021, and the older bastardy acts, viz. prior to 1923, were considered as having identical purposes, that is to compel persons charged by the law with support of designated dependents to meet the full measure of their obligation to such dependents.[21] Ohio G. C. Sec. 13008 makes failure to support an illegitimate child a felony. *Ogg* v. *State*[22] holds that an indictment under this section need not allege that in a previous proceeding, under the Bastardy Act, the accused had been adjudged to be the putative father of such child. Therefore, it must be admitted that the liability is charged the putative father even before he is adjudged the putative father.[23]

Because these statutes have imposed this liability consistently, and continuously since the beginning of the nineteenth century, it is improbable that the Legislature intended to limit the liability of

[19] See State *ex rel.* Beebe v. Cowley, 116 Ohio St. 377, 156 N. E. 214 (1927); 5 OHIO JUR., "Bastardy," sec. 7.

[20] The first Bastardy Act was passed in 1824. See note 3, *supra*.

[21] McKelvy v. State, 87 Ohio St. 1, 99 N. E. 1076 (1912); Gillette v. State, 15 Ohio App. 360, motion to certify record overruled in 20 Ohio L. Rep. 4; see State v. Veres, 75 O. S. 138, 78 N. E. 1005 (1906).

[22] Ogg v. State, 73 Ohio St. 59, 75 N. E. 943 (1905).

[23] *See* Seaman v. State, 106 Ohio St. 177, 140 N. E. 108 (1922) where in a proceeding under Ohio G. C. sec. 13008, the putative father of a bastard child paid to the clerk of court a sum certain, *"being the amount of accumulated arrearage from the day of the birth of the child to the day when the court made the order."*

the putative father, in case the child is alive at the adjudication, to support only from that date. It is very unlikely that it was intended to thus place a premium on the ability of the accused to delay the commencement of the action or the adjudication thereof. Since *support* of the bastard child by the reputed father *until it is eighteen years old* is the essence of the bastardy proceeding, it seems unwise, in the light of what has been discussed above, for the court to impose such limitation upon this obligation.

M. D. D.

Power of Court to Modify Decree for Support Which Incorporates Agreement of Parties

The court incorporated into a divorce decree the principal provisions of a separation agreement, providing for a property settlement and for specified monthly payments by the father for the support of his minor child. Subsequently the father moved the court to alter the decree so as to reduce the amount payable for support, on the ground of changed conditions. *Held,* that the court had no authority to reduce the amount ordered in the decree, as to do so would be to impair the obligation of a contract.[1]

In the absence of such a contract between the spouses, it is generally acknowledged that a court of equity may, upon proper allegations of the changed conditions and circumstances of the parties, modify the decree, either by increasing or decreasing the allowance.[2]

In the holding in the principal case, the Supreme Court of Ohio went against the great weight of authority in America,[3] but was not

[1] Tullis v. Tullis, 138 Ohio St. 187, Ohio Bar (May 5, 1941).

[2] Monahan v. Monahan, 14 Ohio App. 116 (1921); Connolly v. Connolly, 16 Ohio App. 92 (1922); Olney v. Watts, 43 Ohio St. 499, 3 N. E. 354 (1885); Meissner v. Meissner, 11 Ohio C. C. 1, 5 Ohio C. D. 305 (1895); Baker v. Baker, 4 Ohio App. 170, 21 Ohio C. C. (N.S.) 590, 60 W. L. Bull. 25 (1915); Smedley v. State, 95 Ohio St. 141, 115 N. E. 1022 (1916); Sager v. Sager, 5 Ohio App. 489, 26 Ohio C. C. (N.S.) 522, 37 Ohio C. C. 559 (1916). The rule has been recognized in Clough v. Long, 8 Ohio App. 420, 28 Ohio C. A. 423, 40 Ohio C. C. 185, 63 W. L. Bull. 205 (1918); Garver v. Garver, 102 Ohio St. 443, 133 N. E. 551 (1921). *See* annotation in 71 A. L. R. 723, and cases cited therein.

[3] Pryor v. Pryor, 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700 (1908); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925); Maginnis v. Maginnis, 323 Ill. 113, 153 N. E. 654 (1926); Langrall v. Langrall, 145 Md. 340, 125 Atl. 695, 37 A. L. R. 437 (1924); Aldrich v. Aldrich, 166 Mich. 248, 141 N. W. 542 (1911); Kelly v. Kelly, 194 Mich. 94, 160 N. W. 397 (1916); Warren v. Warren, 116 Minn. 458, 133 N. W. 1009 (1912); Connett v. Connett, 81 Neb. 777, 116 N. W. 658 (1908); Wallace v. Wallace, 74 N. H. 256, 67 Atl. 580 (1907); Le Beau v. Le Beau, 80 N. H. 139, 114 Atl. 28 (1921). For other authorities and statement of the general rule see annotations in 58 A. L. R. 639 and 109 A. L. R. 1068.